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Cases of Note-Copyright-Guesstimating Lost Sales

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LEGAL ISSUES



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Cases of Note — Copyright

Guesstimating Lost Sales

Column Editor: **Bruce Strauch** (The Citadel, Emeritus) <bruce.strauch@gmail.com>

United States Naval Institute v. Charter Communications, Inc. and Berkley Publishing Group. United States Court of Appeals for the Second Circuit, 936 F.2d 692; 1991 U.S. App. Lexis 12802.

Wouldn't you know it. A university press hits one out of the ballpark, but there has to be litigation. Yes, I'm talking *Hunt for Red October*. Of course. It had to be that or *Confederacy of Dunces*.

It was the 1980s when the publishing world had convinced itself that men didn't read and decided to publishing nothing they would want to read.

Tom Clancy wanted Annapolis, but was nearsighted and instead became a frustrated insurance salesman who wrote on weekends. And no one wanted his book.

Enter the **Naval Institute Press** which had never published a novel before. When **Clancy** asked to come make a pitch, they thought he wanted to sell them insurance. And of course he had never been on a submarine, although the details were so accurate the Secretary of the Navy thought someone had leaked classified info.

They paid him \$5,000, and they took copyright. And then **Ronald Reagan** told *Time* magazine it's "my kind of yarn."

The book vaulted **Tom Clancy** into the ranks of major writers, got him a \$3 million contract with **Putnam**, and the prequel, the 1987 bestseller *Patriot Games*. And the mystery field had a new sub-genre: the techno-thriller.

Clancy had 28 books, 17 *New York Times* bestsellers, co-founded **Red Storm Entertainment** (video games), died young at age 66.

Red October became the hit movie of 1990 with **Sean Connery**. And curiously, there is a phony **Christopher Columbus** quote at the end. "*And the sea will grant each man new hope, as sleep brings dreams of home.*" It was an invention of the screenwriter.

But let's go back to the earliest days.

Naval Institute Press (holding copyright) licensed **Berkley** to publish a paperback edition "not sooner than October 1985." This of course was to exhaust hardback sales before paper appeared.

Berkley jumped the gun and sent books out for sale in September, 1985. Sales were near the top of paperback best-sellers lists before the end of that month.

Naval asserted copyright infringement and asked for the September profits estimated at \$724,300.

The district court held that though "the extent of the breach was a relatively trivial matter of two weeks of sales, the term breached was crucial to the scope of the license, as it governed when the license would take effect." **Naval I**, 875 F.2d at 1049-51.

The court looked at the downward trend in hardback sales of the novel from March through August, decided most of the paperback buyers would not have bought a hardback, and awarded \$35,380.50 in actual damages.

Talk about your wild guesstimates.

The Appeal

Which was what **Berkley** claimed on appeal, calling the \$35-thou speculative.

The court held it is true that the \$724-thou figure does not define **Naval's** loss because many buyers were waiting for the paperback anyway. But

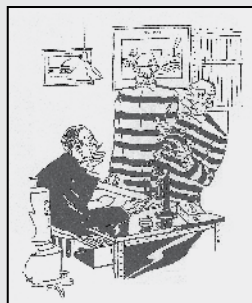
although there was a declining trend, **Naval** continued to sell hardbacks through the end of 1985 at around 3,000 a month.

The fact-finder court was within its prerogative to look to **Naval's** August sales. The evidence is of necessity hypothetical, but it is not error to lay the normal uncertainty at the door of the wrongdoer. *See, e.g., Lamborn v. Dittmer*, 873 F.2d 522, 532-33 (2d Cir. 1989); *Lee v. Joseph E. Seagram & Sons, Inc.*, 522 F.2d 447, 455-56 (2d Cir. 1977).

Berkley provided no evidence that sales are evenly spread across a month. It in fact conceded that "to a large degree, book sales depend on public whim and are notoriously unpredictable ..." (**Berkley** brief on appeal at 31 n.15).

So it was quite possible that hardback sales might have picked up in the end of September. And it was proper for the court to exercise generosity towards **Naval** rather than the breaching **Berkley**.

And what does that get you by way of understanding. Well, not much I'd say unless we saw the sales figures and the judge's guesstimate. Which would put everyone to sleep. ☹



Questions & Answers — Copyright Column

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QUESTION: *A professor of music asks about the recent bills that would expand the U.S. copyright law to protect pre-1972 recordings.*

ANSWER: Oddly enough, although musical compositions have been protected by copyright in the United States since 1831,

sound recordings were not protected until 1972. Earlier sound recordings remain unprotected by federal copyright. Since passage of the **Copyright Act of 1976**, there has been debate about the lack of protection for pre-1972 music recordings. Many of these recordings are still

continued on page 71